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### An Inflection Point for Disaster Relief: Superstorm Sandy

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## AN INFLECTION POINT FOR DISASTER RELIEF: SUPERSTORM SANDY

*Danshera Wetherington Cords\**

### I. INTRODUCTION

This symposium considering Superstorm Sandy (“Sandy”), the fourth costliest hurricane in U.S. history,<sup>1</sup> is important as a teaching tool and a reminder of the effects of partisan politics in disaster recovery. The relief and recovery efforts following Sandy show the degree to which the lessons of the early disasters of the 21st century can be quickly forgotten.

Between 1980 and July 2019, there were 250 disasters that caused more than \$1 billion damage each,<sup>2</sup> which caused a total of \$1.7 trillion in damages.<sup>3</sup> Almost 60 percent of that damage resulted from tropical cyclones,<sup>4</sup> \$927.5 billion through early 2019.<sup>5</sup> Storms causing billions of dollars of damage are occurring more frequently.<sup>6</sup> The National Oceanic and Atmospheric Administration (“NOAA”) estimates that the damage caused by hurricanes will increase by an annual average of \$7.3 billion per year over the next 30 years.<sup>7</sup>

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\*Professor of Law, Albany Law School. I would like to thank the participants of the Touro Law School faculty workshop for their helpful comments on this series of papers. I would also like to thank Greg Kiley, Albany Law School class of 2019, for his invaluable research assistance and Albany Law School for its financial support.

<sup>1</sup> *Billion-Dollar Weather and Climate Disasters: Overview*, NAT’L OCEANIC & ATMOSPHERIC ADMIN., NAT’L CTRS. FOR ENVTL. INFO., <https://perma.cc/L65K-BV49> [hereinafter *Billion-Dollar Weather and Climate Disasters*].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Tropical cyclones are more commonly referred to as tropical storms, tropical depressions, and tropical hurricanes.

<sup>5</sup> *Supra* note 1.

<sup>6</sup> *See, e.g., Fast Facts: Climate Change Predictions*, OFF. FOR COASTAL MANAGEMENT, NAT’L OCEANIC & ATMOSPHERIC ADMIN., <http://perma.cc/ZM7T-Q4X6>.

<sup>7</sup> *Id.*

In 2012, Sandy caused more than \$70.2 billion in damage,<sup>8</sup> \$19 billion of that in New York City alone.<sup>9</sup> Damage of that magnitude requires more resources for recovery than any one community or state can afford. Unless we simply abandon areas hit by massive disasters, federal intervention is necessary. Although not all people or members of Congress support federal intervention in all cases, the use and availability of federal disaster recovery assistance is essential following massive disasters. In the interest of justice and equity, how it is granted and who receives it is a question of fundamental fairness. When federal disaster relief is required, its grant or denial should not depend on largely partisan politics. Those who are already victims are then pawns and often receive aid in a manner that exacerbates social injustices and inequities.

Early in the 21st century, the rapid appropriation of federal disaster funds was almost a given. Although the response to large-scale disasters was not perfect, failures generally did not result from partisan politics. In response to failures, the responses were studied and examined; then changes were made in the planning process to improve the disaster relief system, as in the case of the on the ground response to Hurricane Katrina.

Sandy marked an inflection point in federal disaster relief. The ground response was immediate, unlike what happened following Katrina. Unfortunately, that was where the response faltered and failed. Financial support failed to materialize and left residents and households without assistance to recover in a timely manner. Although federal relief has always been problematic between bureaucratic limitations and an effort to balance timely payment and fraud prevention, Sandy added the element of prolonged partisanship to the passage of disaster relief appropriations.

Sandy demonstrated an increased politicization of federal fiscal response to major disasters as Congress worked to pass a supplemental appropriation to fund disaster relief. The politicization increases the dysfunction associated with recovery, reducing the possibility for individuals and households to return quickly to their former lives. Studies of the response to major hurricanes making landfall between 2005 and 2019 shows that Sandy was an inflection point in our federal response, marking a political and social low point.

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<sup>8</sup> *Id.*

<sup>9</sup> Emily Greenhalgh, *How Sandy Affected New York's Long-Term Planning*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., <https://perma.cc/46CY-AHZ6>.

Those who suffer the greatest harm are those who are most vulnerable. Because at any time, any of us could be the survivor of a disaster, we all have a vested interest in ensuring that the federal, state, and local responses to disasters are appropriate and adequate.

Although in many instances, there has been an undercurrent in the grant of relief that depends on whether the victims are truly “deserving” of relief, we are all at risk. The choices we make about disaster relief have the potential to affect us all as climate change results in changes in disaster patterns and frequency. The social contract theory of justice and John Rawls’ “veil of ignorance”<sup>10</sup> might be a good starting point from which to build a disaster relief system. Under Rawls’ conception of justice,

no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities.<sup>11</sup>

Using this frame would replace post-disaster considerations of whether a survivor deserved relief with more objective pre-disaster criteria to determine when relief will be granted, eliminating the potential for partisan politics as a determinative factor.

This Article discusses how recent changes made as part of ongoing efforts to improve the federal disaster response has not eliminated disparities of treatment among survivors, demonstrating the continued problems with our system of ad hoc legislation for disaster relief and recovery. This Article demonstrates that this longstanding problem has grown worse. There were two failure points: first, the efforts to provide immediate relief to the Sandy victims following the storm; and second, disbursing the aid that was finally appropriated for disaster recovery. These failure points are an inflection, marking a movement from simply inadequate and cumbersome administrative policies to lack of political and popular will and empathy creating sufficient motivation to timely provide adequate financial resources manner to allow reconstruction to proceed expeditiously.

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<sup>10</sup> JOHN RAWLS, A THEORY OF JUSTICE, at 11 (1971).

<sup>11</sup> *Id.*

This Article proceeds in the following manner. Part II discusses how disaster relief has evolved to create our current expectations. This Part examines recent experiences, including the federal appropriations following hurricanes between Katrina and Sandy, two of the five costliest storms in U.S. history. This Part also compares the treatment of hurricane relief to the treatment of first responders following the terror attacks of 9/11/2001 (“9/11”). In Part III, it discusses the appropriation and use of funds following Sandy and explores some of the reasons for the shift in attitude regarding appropriations and disbursement of disaster relief funds. In Part IV, this Article considers the efforts at appropriating and using funds to assist areas affected by the record-setting storms of 2017, Harvey and Maria, followed by the massive storms that quickly followed in 2018. In Part V, this Article concludes with recommendations for improving the delivery relief.

## II. DISASTER RELIEF FUNDING

From its founding, most Americans have expected that the government would help people recover from hardship that resulted from events beyond the control of the victims.<sup>12</sup> Congress’s power to provide disaster relief came from its power to tax and spend for the general welfare as is necessary and appropriate.<sup>13</sup> It was not uncommon for Congress to grant disaster relief.<sup>14</sup>

Whether Congress would or should grant relief often depended on the degree to which the victims were perceived to deserve assistance. Whether a victim was perceived as deserving assistance often boiled down to the manner in which the request was framed.<sup>15</sup>

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<sup>12</sup> See, e.g., Michele Landis Dauber, “*Let Me Next Time Be ‘Tried By Fire’*”: *Disaster Relief and the Origins of the Welfare State 1789-1984*, 92 NW. L. REV. 970-73, 979 (1998) (comparing the differences between providing disaster relief to the blameless and cases where it was “determined that the [victim] was responsible for his situation, either by his actions or because he somehow assumed the risk of loss.”

<sup>13</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>14</sup> Dauber, *supra* note 12, at 973 (discussing the genesis of disaster relief as coming from the challenges of moving to a new land with a hostile environment and indigenous people). Many of the first Congresses’ actions were to grant relief to flood victims. *Id.* at 974.

<sup>15</sup> *Id.* at 970. Professor Dauber traced the advent of modern welfare to disaster relief. *Id.* She observes that “certain federal subsidies for needy and destitute beneficiaries who have lost out in a ‘disaster’ have increased at the very same time that an astonishingly similar array

Over time, our understanding of the appropriate role for the Federal Government in disaster relief has changed dramatically. This view has evolved, and, today people expect federal assistance following a major disaster. Notwithstanding that expectation, federal resources are designed to be the last available resources.<sup>16</sup> The Federal Government is not responsible for all disaster relief. Primary responsibility for disaster relief falls on state and local authorities and their resources. The Federal Government often takes a wait-and-see approach before determining the degree to which it will intervene following a disaster.

More recently, there has been a further shift that has slowed the flow of relief to victims for disaster recovery. Questions often arise relating to the wisdom of Congressional appropriation of funds to rebuild communities destroyed by disasters. These questions take two forms. The first is whether areas subject to repeated disasters should be rebuilt time and again.<sup>17</sup> The second is whether, in times of increasing deficits, the Federal Government should pay for disaster relief.<sup>18</sup>

Debates regarding the amount and timing of resources to be devoted to recovery from any specific disaster have become increasingly partisan. These more prolonged and political battles have led to public controversy. The shift in Congressional budget priorities, which are often disconnected from the public's view of the most important societal needs, including that of their own constituents, has led to major public disappointment and anger when the federal response is seen as inadequate. As a result, the current disaster relief funding approach requiring supplemental appropriations for major disasters in a time of budget deficits and fiscal conservatism is likely to lead to ongoing political battles over disaster relief.

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of human needs are attributed to the moral failures of the claimants and left to their 'personal responsibility' to ameliorate," their own situation. *Id.* She claims this is an explanation for today's reluctance to grant aid following some major disasters and the relative urgency in granting complete relief following other major disasters. *Id.*

<sup>16</sup> Robert T. Stafford Disaster Relief and Emergency Assistance Act §§ 401-17.

<sup>17</sup> CONG. JT. ECON. COMM., THE NEED TO REBUILD SMARTER 1 (2017).

<sup>18</sup> See, e.g., 165 CONG. REC. S4879 (daily ed. July 17, 2019) (statement of Mr. Paul) ("We have a \$22 trillion debt. We are adding debt at about \$1 trillion a year. Therefore, any new spending that we are approaching, any new program that is going to have the longevity of 70 or 80 years should be offset by cutting spending that is less valuable." These statements were part of his objections to a motion for unanimous consent to approve additional spending for relief for first responders made sick by their actions for relief and recovery in response to the terror attacks on 9/11/2001.)

Following recent storms, Congressional appropriations have been:<sup>19</sup>

<b>Hurricane</b>	<b>Year</b>	<b>Total Federal Spending (in billions)</b>	<b>Total Damage (in billions)</b>	<b>Federal Spending as a % of Damage</b>
Dennis	2005	\$0.3	\$3.5	9%
Katrina	2005	\$110.2	\$157.4	75%
Rita	2005	\$8.7	\$22.4	39%
Wilma	2005	\$6.2	\$22.4	28%
Dolly	2008	\$0.3	\$1.1	27%
Gustav	2008	\$4.0	\$4.0	60%
Ike	2008	\$12.3	\$33.7	36%
Irene	2011	\$4.3	\$15.5	28%
Isaac	2012	\$1.3	\$3.2	41%
Sandy	2012	\$53.9	\$69.9	77%

As discussed below, following Sandy was the first time that a disaster causing tens of billions of damages faced significantly delayed Congressional appropriations to aid recovery efforts. This shift away from nearly certain federal financial assistance, especially in the face of what was clearly the one of the costliest natural disaster on record.<sup>20</sup> In part, this disconnect was driven by the presence of a new and powerful group within the Republican party, the Tea Party caucus, which formed during the 2010 midterm elections out of a desire to increase fiscal responsibility. As a result of the Tea Party caucus,

<sup>19</sup> *Id.* at 4. One problem in this data analysis is that the numbers do not add up. The totals used to determine the amount of damage are not the total damage accepted by NOAA, which is the most widely accepted source for determination of data. Even that data, as described in its calculation methodology, acknowledges that it misses elements of the costs of natural disaster relief and recovery. Moreover, the determination of the amount of data is not otherwise defined. That makes this analysis of the amount of federal assistance provided in each of these hurricanes as a percent of the damage caused suspect, as it is impossible to determine what the investigator considered to be the appropriate measure. There are clearly items that were included and excluded, but the analysis does not inform the reader which should properly be considered. Therefore, it is unrealistic to apply these numbers to say that victims of Sandy were fully funded.

<sup>20</sup> *See supra* note 1.

disaster appropriations slowed to a snail's pace because of political pressure to decrease spending, including to reductions in spending to pay for disaster relief. Many members of Congress who had voted for Katrina relief now voted against Sandy relief or at least did not push for it.<sup>21</sup> This lack of assistance was also not the result of the Disaster Relief Fund ("DRF") running out of money, as it had in prior emergencies.<sup>22</sup>

### A. Invoking Federal Disaster Assistance Pre-Sandy

The role of the Federal Government in disaster relief and recovery is hotly debated. The public expects immediate federal aid available on the ground in the immediate wake of a disaster and that it will continue until recovery is complete. This general expectation is somewhat undefined and leads to controversies that can be anticipated any time vague general consensus applies without specific context and limiting rules. Some contend that the Federal Government currently plays too great a role in disaster response, relief, and recovery.<sup>23</sup> Many have suggested that the increasing number of Presidentially declared Major Disasters is politically motivated.<sup>24</sup> Moreover, as a matter of policy, many argue that the responsibility for recovery should be

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<sup>21</sup> New York Democrat House Representative Joe Crowley was said to as have "a painful and vivid memory of Hurricane Sandy in 2012, and the refusal of some Republicans to approve aid to victims in New York and New Jersey (several Louisiana 'hypocrites,' . . . voted against Sandy aid but want Democrats to approve Louisiana aid now.") <https://www.usnews.com/news/articles/2016-09-30/the-partisan-politics-of-disaster-relief>; Aliyah Frumhin, *Flashback: GOP has a history of blocking disaster aid*, MSNBC, May, 22, 2013 (discussing requests for federal aid for Oklahoma tornado damage by republican lawmakers who voted against aid packages for hurricanes, quoting Oklahoma Senator James Inhofe as calling the Sandy aid that he voted against "totally different.") <http://www.msnbc.com/hardball/flashback-gop-has-history-blocking-disa>.

<sup>22</sup> See, e.g., Elaine Pitman, *FEMA Under Fire As Natural Disasters Pile Up*, GOV'T TECH., Aug. 30, 2011 (discussing the hold FEMA had to put on taking applications for assistance for repair and rebuilding following the tornadoes in Joplin [eskhttps://www.govtech.com/em/disaster/FEMA-Under-Fire-as-Natural-Disasters-Pile-Up.html](https://www.govtech.com/em/disaster/FEMA-Under-Fire-as-Natural-Disasters-Pile-Up.html)).

<sup>23</sup> See, e.g., Ross C. Paolino, *Is It Safe to Chevron "Two-Step" in A Hurricane? A Critical Examination of How Expanding the Government's Role in Disaster Relief Will Only Exacerbate the Damage*, 76 GEO. WASH. L. REV. 1392, 1394 (2008); Elaine C. Kamarck, *When First Responders Are Victims: Rethinking Emergency Response*, 1 HARV. L. & POL'Y REV. 97 (2007) (discussing the Federal Government's role in disaster relief and as director of disaster response).

<sup>24</sup> BRUCE LINDSAY, CONG. RESEARCH SVC., STAFFORD ACT DECLARATIONS 1953-2016: TRENDS, ANALYSES, AND IMPLICATIONS FOR CONGRESS, 21-25 (2017).



addressed entirely at the state and local level.<sup>25</sup> State and local governments are in the best position to know what their citizens need because they possess unique knowledge of the people, the area, the challenges, and the circumstances.<sup>26</sup> Aid for major disasters is expected to first come from the state, local, and tribal government resources, including nonprofits. If the local resources are inadequate, aid is then expected to come from federal sources.<sup>27</sup>

Under current law, a governor or tribal leader may request federal assistance from FEMA under the Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1988 (“Stafford Act”) when a disaster exceeds the state and local government’s capacity to respond.<sup>28</sup> The FEMA director then determines whether the disaster warrants a recommendation for the President to issue a Major Disaster

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<sup>25</sup> AMY LEPORE, *THE CENTRALIZATION OF EMERGENCY MANAGEMENT* 3 (2017) (discussing the application of the tension between state management and the need for federal money to finance recovery and reconstruction following major disasters).

<sup>26</sup> See, e.g., Elizabeth F. Kent, *Where’s the Cavalry?” Federal Response to 21st Century Disasters*, 40 *SUFFOLK U.L. REV.* 181, 187 (2006) (discussing the tension between federalism and state police power).

<sup>27</sup> Thomas E. Drabek, *Managing the Emergency Response*, 45 *PUB. ADMIN. REV.* 85, 85-91 (1985).

<sup>28</sup> 42 U.S.C. § 5121 *et seq.* (2018). The governor’s request for a declaration of a presidentially declared disaster and federal assistance must be made pursuant to 42 U.S.C. § 5170(a) stating that “based on a finding that the disaster is of such severity and magnitude that effective response is beyond the capabilities of the State and the affected local governments and that Federal assistance is necessary.” *Id.*

Declaration (“Presidential Disaster Declaration”).<sup>29</sup> These procedures are codified in the Stafford Act and the Code of Federal Regulations.<sup>30</sup>

The President has significant discretion in making Presidential Disaster Declarations. The process by which a President decides to issue a Presidential Disaster Declaration is very opaque. Some Presidential Disaster Declarations are made before the disaster actually occurs, which allows the prepositioning of resources, including personnel and emergency supplies. Other Presidential Disaster Declarations are not made until after the disaster event, and the damage can be assessed. The discretion and opacity add to the uncertainty of relief and inequity of treatment of those affected. As discussed below, there is also some concern that electoral politics may influence Presidential Disaster Declarations.

To fund federal disaster relief efforts, Congress makes an annual appropriation to the DRF as part of the budget for FEMA. This amount is never expected to be the full amount of assistance that will be required if there is a major disaster or if there are multiple disasters. However, the DRF appropriations are “no-year” appropriations that carry over to future years if unspent. However, in most years, supplemental appropriations are required to fully fund the DRF and meet the needs of FEMA’s obligations. Most years several supplemental appropriations bills are introduced in Congress to

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<sup>29</sup> *Id.* § 5170(a).

All requests for a declaration by the President that a major disaster exists shall be made by the Governor of the affected State. Such a request shall be based on a finding that the disaster is of such severity and magnitude that effective response is beyond the capabilities of the State and the affected local governments and that Federal assistance is necessary. As part of such request, and as a prerequisite to major disaster assistance under this chapter, the Governor shall take appropriate response action under State law and direct execution of the State’s emergency plan. The Governor shall furnish information on the nature and amount of State and local resources which have been or will be committed to alleviating the results of the disaster, and shall certify that, for the current disaster, State and local government obligations and expenditures (of which State commitments must be a significant proportion) will comply with all applicable cost-sharing requirements of this chapter. Based on the request of a Governor under this section, the President may declare under this chapter that a major disaster or emergency exists.

*Id.*

<sup>30</sup> *The Presidential Disaster Declaration Process*, FED. EMERGENCY MGMT. ADMIN., <http://perma.cc/F8QD-DFMZ>. The process for declaring a major disaster is found in the federal regulations. 44 CFR Part 206, Subpart B. FEMA’s recommendations are based on the estimated damage per capita depending on the type of disaster. *Per Capita Impact and Project Thresholds*, FED. EMERG. MGMT. ADMIN., FY 2019, <https://perma.cc/F75P-TURY>.

provide relief following one or more disasters.<sup>31</sup> Unfortunately, this structure ensures that in the wake of a major disaster, new legislation is required. It is not at all surprising that such piecemeal legislation has resulted in inequitable consequences to survivors of different disasters.<sup>32</sup>

A Presidential Disaster Declaration makes available a number of federal disaster relief programs and resources to the citizens, states, and local governments. Not only does it allow FEMA to coordinate and direct the response efforts, it also provides money, supplies, and support for the immediate needs of survivors, and it triggers the availability of additional individual and community aid.<sup>33</sup>

The Stafford Act<sup>34</sup> requires FEMA to develop a national emergency preparedness plan in cooperation with state and local governments, and nonprofit disaster and relief organizations, to ensure the availability of immediate and long-term assistance following Presidential Disaster Declarations.<sup>35</sup> Federal assistance for individuals and households includes a variety of programs. First, FEMA and other federal organizations are to ensure that individuals and households have access to temporary housing, legal assistance, small cash grants, and individual food grants, and low-interest Small Business Administration (SBA) loans.<sup>36</sup> However, even though they carry a

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<sup>31</sup> In 2019, the following bills have been introduced through May 31, 2019: Supplemental Appropriations Act of 2019, H.R. 268, 116th Cong. (2019) (would provide \$12.1 billion to a variety of federal agencies for numerous recent disasters); Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2019, H.R. 265, 116th Cong. (2019) (would provide aid to farmers and increase food security in Puerto Rico); Protecting Disaster Relief Funds Act of 2019, H.R. 1214, 116th Cong. (2019) (would protect already appropriated disaster relief funds from being transferred or allocated to the construction of a southern border wall); Protecting Disaster Relief Funds Act of 2019, S. 534, 116th Cong. (2019) (would protect previously appropriated disaster relief funds from being transferred or allocated to construction of a southern border wall); Additional Supplemental Appropriation For Disaster Relief Act of 2019, H.R. 2157, 116th Cong. (2019) (would provide \$17.2 billion to a variety of federal agencies for numerous recent disasters).

<sup>32</sup> Patrick E. Tolan, Jr., *After the Disaster: Lessons Learned About Tax Relief From Hurricanes Katrina and Sandy*, 85 MISS. L. REV. 553, 593 (2016); Ellen P. Aprill & Richard Schmalbeck, *Post-Disaster Tax Legislation: A Series of Unfortunate Events*, 56 DUKE L.J. 51, 52 (2006); Danshera Cords, *Charity Begins at Home? An Exploration of the Systemic Distortions Resulting from Post-Disaster Giving Incentives*, 44 RUTGERS L.J. 213, 263-70 (2014).

<sup>33</sup> 42 U.S.C. § 5121 *et seq.*

<sup>34</sup> Pub. L. 100-707, 102 Stat. 4689 (Nov. 23, 1988) (amended the Disaster Relief Act of 1974, Pub. L. 93-288, 88 Stat. 143 (May 22, 1974)).

<sup>35</sup> 42 U.S.C. § 5152(a).

<sup>36</sup> *Id.* § 5170(a).

low-interest rate, SBA loans can be problematic on a couple of levels. First, they require that the borrower be creditworthy, which is not always the case for disaster survivors. Second, they increase the debt load of the borrower, which may not be sustainable, especially when the approval and rebuilding process can be very slow.

FEMA's community-wide programs include Public Assistance Grants. The Public Assistance grants are made to recovery providers including state and local governments and nonprofits that administer the grants pursuant to FEMA standards, distributing the funds as required under the terms of the grants for the benefit of the community.<sup>37</sup> Public Assistance grants can be used for debris removal, repair and replacement of publicly-owned facilities and the repair, restoration, or replacement of facilities owned or operated by a nonprofit.<sup>38</sup> Public assistance grants require a local cost share of up to 25 percent, although the cost-share can be lowered or waived.<sup>39</sup> FEMA can also make community disaster loans to local governments that have lost a significant portion of their tax revenue.<sup>40</sup>

The Department of Housing and Urban Development makes Community Development Block Grants (CDBG) for the recovery of communities. CDBG for disaster recovery can be used for disaster relief, long-term recovery, the restoration of infrastructure, housing, and economic revitalization.<sup>41</sup> The Federal Government is generally expected these projects.

These are only a few of the programs that are available. In addition, many of them are operated by FEMA, but disaster relief is also conducted through many other agencies, including the Coast Guard, the U.S. Army Corps of Engineers, and the Department of Housing and Urban Development. The variety of programs and agencies involved in disaster relief makes it hard to determine the aid that is available, the amount that has been used, and the amount that has actually been paid to survivors. Moreover, the federal response to natural disasters has never been perfect.

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<sup>37</sup> *Id.* § 5172.

<sup>38</sup> 42 U.S.C. § 5172.

<sup>39</sup> 42 U.S.C. §§ 5172, 5173, 5189.

<sup>40</sup> 42 U.S.C. § 5184. Percentage and dollar limitations apply. *Id.*

<sup>41</sup> 42 U.S.C. §§ 5321.

Politics may affect whether the President is willing to make a Presidential Disaster Declaration.<sup>42</sup> Politics also affects whether funds are appropriated to pay for disaster relief. As discussed above, a Presidential Disaster Declaration is necessary to trigger the availability of federal disaster relief resources. In some cases, including landfall of one of these storms, a Presidential Disaster Declaration is almost a foregone conclusion, although the timing of the declaration is important. However, even following the declaration, presidential politics remain important as the threat of a veto for a disaster relief appropriation may hold up legislation.<sup>43</sup>

For these programs to be available beyond the minimum DRF appropriation, Congress must appropriate additional funds. Spending decisions are always political and always involve compromise. A vote to support a spending bill by one legislator now will be expected to garner reciprocal support in the future, which may also be in the interest of the legislator's constituents.

Spending became even more political as budget deficits began to increase. Rising concerns about the sustainability of deficit spending and the level of the national debt led to the enactment of the Budget Control Act of 2011 (BCA).<sup>44</sup> Among other things, the BCA provided a discretionary spending cap on disaster spending at 10

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<sup>42</sup> The number of Presidential Disaster Declarations fluctuates, with the number of requests that are turned down in relation to the election cycle being 23.1 percent in years preceding a presidential election, 24.2 percent in presidential election years, 26.6 percent in the year following a presidential election, and 26.4 percent in a midterm election year. When viewed solely in terms of the presidential election cycle, the number of Presidential Disaster Declaration requests that are turned down remains at 24.2 percent in the year of a presidential election and averages 25.3 percent in all other years. Bruce R. Lindsay, CONG. RES. SVC., STAFFORD ACT DECLARATIONS 1953-2016: TRENDS, ANALYSES, AND IMPLICATIONS FOR CONGRESS, 22 (2017) (The averages are for the years between 1974 and 2016, and are calculated using the data from U.S. Dept. of Homeland Security, Federal Emergency Management Agency, Presidential Disaster Declarations, available at <https://fema.gov/disasters>.).

<sup>43</sup> Erica Werner & Jeff Stein, *Disaster aid stalls in Senate amid fight over Puerto Rico*, BOSTON GLOBE, Apr. 2, 2019, at A5; *Emergency Aid May Trump Veto*, ENG. NEWS-REC., May 17, 1999, Vol. 242, No. 19, p. 13. ("presidential veto threats hanging over an emergency disaster relief and foreign assistance bill are prompting House and Senate negotiators to craft a bill that contains no extraneous measures."); *Veto Threat Looms Over Disaster Bill*, CHIC. SUN-TIMES, June 5, 1997, at News 22, ("The Republicans, ignoring the veto threat, said they would attempt to rush the measure through the House and Senate today and send it to the White House.").

<sup>44</sup> The Budget Control Act of 2011, Pub. L. No. 112-25, §§ 101-103 125 Stat. 240 (amending the Balanced Budget and Emergency Deficit Control Act of 1985 (BBEDCA)).

percent below the average of the funding over the previous 10 years, excluding the highest and lowest years.<sup>45</sup>

Spending on disaster relief is particularly fraught because, in many ways, all disasters are inherently local. Some areas are particularly prone to particular disasters such as flooding in Louisiana and wildfires and earthquakes in Southern California. No area is completely immune to disasters. Therefore, any approach that denies federal relief to one area that is devastated beyond the capacity of state and local resources puts all other areas in the future at risk because of the lack of past cooperation.

This is apparent from the degree to which major disaster spending has become a political hot potato.<sup>46</sup> When, whether, and how much federal relief will be granted has become a matter subject to much political debate. A significant factor in the ultimate determination of long-term aid seems to be the attention the disaster garners in the media, resulting in public calls for support. Because of their cataclysmic nature and the fact that was no major media event occurred close on their heels, Hurricane Katrina and the 9/11 terrorist attacks remained in the news cycle much longer than most events.

Both events warranted huge outpourings of support, but perhaps for different reasons. Both involved shocking devastation and human suffering. Congressional disaster relief was relatively rapid following these events. 9/11 garnered enormous media attention because of the horrifying nature of the event; the federal disaster relief efforts demonstrated initial successes that did not last.

Katrina reflected failures from the beginning to the end. The state and federal level responses were woefully inadequate, resulting in the increased media attention, and the relatively rapid Congressional appropriations. Subsequent changes in disaster relief also appear to be a reactive response. As discussed below, such changes appear to be normal. Discretionary Presidential Disaster Declarations, disaster-by-disaster Congressional appropriations, and discretionary disbursements result in the inequities that make up our current disaster relief system. Sandy relief marked an inflection point where the appropriation process failed, requiring fundamental reform.

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<sup>45</sup> The Budget Control Act §103(2), amending BBEDCA §254(e).

<sup>46</sup> See generally, Gregory W. Meeks, *A Storm in Congress: How Partisanship Impacts Disaster Response*, 53 HARV. J. LEGIS. 447 (2016).

The treatment of victims of 9/11 over time also illustrates this paradigm shift. Following the 9/11 terrorist attacks, President George W. Bush stated in his address to America:

Our first priority is to get help to those who have been injured, and to take every precaution to protect our citizens at home and around the world from further attacks. . . . Tonight, I ask for your prayers for all those who grieve, for the children whose worlds have been shattered, for all whose sense of safety and security has been threatened. . . . This is a day when all Americans from every walk of life unite in our resolve for justice and peace. . . . None of us will ever forget this day. Yet, we go forward to defend freedom and all that is good and just in our world.<sup>47</sup>

Volunteers were immediately on the scene from every imaginable agency at the local, state, and federal levels. Federal financial assistance flowed freely.

President Bush's words, and the immediate outpouring of local and humanitarian support, coupled with Congressional action, reflected the best example of disaster relief. People who were injured in the attacks, including first responders, and the families of those who were killed, received prompt attention and substantial aid.

In recent days, we have continued to show this reluctance to provide equitable support for victims of mega-disasters. The victims of the September 11, 2001 terror attacks (9/11) provide a microcosm of this shift over time.<sup>48</sup> The immediate victims of the 9/11 terror attacks received very generous support from both charitable and government sources vis-à-vis victims of other disasters.<sup>49</sup> The

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<sup>47</sup> President George W. Bush, Statement by the President in His Address to the Nation (Sept. 11, 2001), available at <https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010911-16.html>.

<sup>48</sup> It is possible that a case can be made that these victims may be differently situated and not entitled to equivalent treatment because of the passage of time, issues of causation, and causes of death and injury. However, this Article is not going to address those arguments or positions. My position is that all victims of all disasters should be treated equitably, as is discussed throughout.

<sup>49</sup> Charitable contributions to the 35 largest charitable organizations to assist 9/11 victims and their families quickly topped \$2.7 billion. Robert A. Katz, *A Pig in a Python, How the Charitable Response to 9/11 Overwhelmed the Law of Disaster Relief*, 36 IND. L. REV. 251, 252 (2003) (citing U.S. General Accounting Off., September 11: More Effective Collaboration

immediate victims received better treatment than those first responders and law enforcement personnel who spent time in the aftermath sorting through the debris to aid survivors and their families.<sup>50</sup> Victims and their families also received payments from the government through the 9/11 Victim Compensation Fund (VCF), which was created by Congress to compensate victims and their families in exchange for a waiver of their right bring tort claims.<sup>51</sup> Each claimant received an average of \$1.5 million, tax-free.<sup>52</sup> The award from the VCF was offset by amounts received from collateral sources, which included insurance, but not charitable sources.<sup>53</sup>

Although first responders began dying in 2006, it was not until 2010 that Congress ultimately passed the James Zadroga 9/11 Health and Compensation Act, to provide health care and compensation for injuries suffered by first responders.<sup>54</sup> In 2015, this coverage was extended.<sup>55</sup> Then, in February 2019, the 9/11 Victim Compensation Fund, announced that it was running out of money and claims would

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Could Enhance Charitable Organizations' Contributions in Disasters, GAO-03-259 at 7-8 (Dec. 2002). This was more than could spent provide for the immediate and long-term general welfare of those individuals. Historically, charitable disaster relief organizations have limited their support for victims to that amount of money or services necessary to provide for the general welfare and needs of the victims, to avoid problems associated with maintaining their tax-exempt status because they have provided a private benefit. *Id.* at 251, 254.

<sup>50</sup> *Id.*

<sup>51</sup> Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, §§ 401-409, 115 Stat. 230, 237-41 (2001) (codified at 49 U.S.C.A. § 40101. *See generally* Kenneth R. Feinberg, *The September 11th Victim Compensation Fund of 2001: Policy and Precedent*, 56 N.Y.L.S. L. REV. 1115 (2011/2012) (reflections on the fund and its administration by the fund administrator 10 years after its creation).

<sup>52</sup> Saul Levmore & Kyle D. Logue, *Insuring Against Terrorism - and Crime*, 102 MICH. L. REV. 268, 327 (2003) (citing Department of Justice, Compensation for Deceased Victims; Award Payment Statistics tbl.1, at [http://www.usdoj.gov/victimcompensation/payments\\_deceased.html](http://www.usdoj.gov/victimcompensation/payments_deceased.html) (reporting median award as of Apr. 12, 2004 to be \$1,435,349); Martha Chamallas, *The September 11th Victim Compensation Fund: Rethinking the Damages Element in Injury Law*, 71 TENN. L. REV. 51, 79 (2003) (citing an interview with Kenneth Feinberg, American Morning (CNN television broadcast, Sept. 11, 2003)).

<sup>53</sup> 28 C.F.R. 104. *See also* Katz, *supra* note 60, at 589 (2003) (discussing the decision not to offset fund awards by receipts from charitable organizations and application of that rule).

<sup>54</sup> James Zadroga 9/11 Health and Compensation Act of 2010, Pub. L. No. 111-347, 124 Stat. 3623 (reactivating the September 11 Victim Compensation Fund, which had closed in 2003. It expanded health coverage and compensation, setting aside \$2.775 billion for first responders and individuals suffering health effects as a result of the terror attacks.).

<sup>55</sup> James Zadroga 9/11 Victim Compensation Fund Reauthorization Act of 2015, Pub. L. No. 114-113, 129 Stat. 2996.



be paid at a rate of 70 percent or less than earlier claims.<sup>56</sup> This reflects the decreasing political and social will to provide aid to victims and survivors the further in the past the disaster becomes relative to the current need. Finally, in July 2019, legislation was enacted that would fund 9/11 first responder health care and compensation in perpetuity.<sup>57</sup>

This is just another example of a collective reduction in concern for victims of mass tragedies. The immediate response to this announcement has been public and political outrage.<sup>58</sup> However, it is another example of how an ad hoc federal legislative response is resulting in disparate treatment of a vulnerable population now. In this case, we can compare apples to apples, first responders, and survivors whose health was affected at ground zero pre-Sandy to those who have discovered that post-Sandy.

These inequities and the failures in the responses to these disasters result in large part from the manner in which federal responses are structured. Because disaster relief requires supplemental appropriations and is not funded on a continuing basis, the survivors and their communities are at the mercy of the current Congress.

The waning enthusiasm for the continued care of the first responders emphasizes the need to ensure ample, certain aid on the occurrence of major disasters like Sandy. Without certainty, Congress and the public may come to feel fatigued. Certain relief will prevent survivors, unlike the late-diagnosed first responders, and the still suffering Sandy survivors, from finding out many years later that there still is no help available.

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<sup>56</sup> Rupa Bhattacharyya, Message from Special Master Rupa Bhattacharyya (Feb. 15, 2019) (explaining the number of claims awarded, the number of anticipated future claims, the amount remaining in the fund, and the resulting need to reduce future payments), <https://www.vcf.gov/blogprogstatsfeb2019.html> (last visited Feb. 18, 2019), available at <https://perma.cc/532P-FXAC> *see also* Reuters, U.S. Slashes Payouts From 9/11 Victims Fund, N.Y. TIMES (Feb. 15, 2019) (explaining that the special master deemed the reduction in payouts was necessary because the \$7.375 billion fund had only \$2.375 billion remaining, which was insufficient to compensate all of the additional victims and their families at the original rate).

<sup>57</sup> Never Forget the Heroes: James Zadroga, Ray Pfeifer, and Luis Alvarez Permanent Authorization of the September 11th Victim Compensation Fund Act of 2019, Pub. L. No. 116-34,

<sup>58</sup> Shannon Van Sant, *Sept. 11 Victim Compensation Fund Cuts Payouts By As Much As 70 Percent*, NPR (Feb. 16, 2019), <https://www.npr.org/2019/02/16/695481252/9-11-victims-compensation-fund-cuts-payouts-by-as-much-as-70-percent> (quoting Senator Kirsten Gillibrand as stating that she and Senator Corey Booker would be introducing legislation to “ensure that the men and women injured by the toxins at Ground Zero are never forgotten”).

## B. Pre-Sandy Storm Response

Prior to Sandy, FEMA's storm response record was weak. Hurricane Katrina ("Katrina") was perhaps FEMA's greatest failure. Katrina's U.S. landfall on August 29, 2005,<sup>59</sup> resulted in massive devastation that was exacerbated by the breach of the levees on Lake Pontchartrain. The federal response to Katrina was woefully inadequate, sparking both domestic and international outrage. State officials and FEMA failed to preposition adequate supplies and first responders.<sup>60</sup> Evacuation and shelter plans were inadequate and poorly executed. Communications failed. The world watched 24/7 news coverage as victims suffered, trapped in New Orleans.<sup>61</sup> The suffering was massive, caused the evacuation of millions, the displacement of more than 400,000 people, and destroyed more than 300,000 homes.<sup>62</sup>

The immediate inadequacy of the response was blamed on the ineptitude of the leadership at FEMA, racism, and lack of concern for those living in poverty.<sup>63</sup> Despite that, President Bush said of the FEMA director, Michael Brown, "Brownie, you're doing a heckuva job."<sup>64</sup>

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<sup>59</sup> RICHARD D. KNABB, JAMIE R. RHOME, AND DANIEL P. BROWN, NAT'L. HURRICANE CTR., NAT'L. OCEANIC ATMOSPHERIC ADMIN., TROPICAL CYCLONE REPORT HURRICANE KATRINA 23-30 AUGUST 2005, 29-32 (2006) [https://www.nhc.noaa.gov/data/tcr/AL122005\\_Katrina.pdf](https://www.nhc.noaa.gov/data/tcr/AL122005_Katrina.pdf).

<sup>60</sup> Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 522 (2007).

<sup>61</sup> See, e.g., *Eye of the Storm That Forced a City to Flee*, THE DAILY TELEGRAPH (Australia), August 30, 2005 (describing the evacuation to the Superdome in anticipation of Katrina); Julian Borger, *Aftermath of Katrina: "It's like a war zone here. There was shooting and looting,"* Sept. 1, 2005, THE GUARDIAN, 3 (describing the reports of conditions at the Superdome in New Orleans, where those who were not evacuated were trapped; the conditions were inhumane and dangerous and captured the attention of the world, garnering offers of donations and aid from governments and citizens everywhere); Adam Harvey, Stee Gee and Luke McIlveen, *Tales Of Rape Terror And Escape From A Savage City - Hurricane Katrina*, THE DAILY TELEGRAPH (Australia), Sept. 3, 2005, World 3; Nabi Abdullaev, *Rescue Teams Waiting to Help Hurricane Victims*, Sept. 5, 2005, MOSCOW TIMES, No. 3245.

<sup>62</sup> CONG. RES. SVC., FEDERAL DISASTER ASSISTANCE AFTER HURRICANE KATRINA, RITA, WILMA, GUSTAV, AND IKE, R43139, 3 (2019).

<sup>63</sup> While later admitting that the response to Katrina was inadequate, President George W. Bush denied claims that the response failures were a result of racism. See, e.g., *No Racism in Katrina Response, Bush Says; Judge Orders FEMA to Extend Hotel Stays*, CHI. TRIB. 11 (Dec. 13, 2005) (quoting President Bush saying that "You can call me anything you want, but do not call me a racist" during "NBC Nightly News.").

<sup>64</sup> Andrew Zajac & Andrew Martin, *Top FEMA Leaders Short on Experience*, CHI. TRIB. 4 (Sept. 7, 2005).

Many studies were done that attempted to pinpoint the failures and ensure that such an error would not recur.<sup>65</sup> Katrina caused over \$125 billion in damage, and no one understood why the Federal Government and FEMA responded so inadequately.

It would have been unthinkable for Congress to have failed to provide immediate financial relief to the survivors. Congress introduced and passed, with the President's support, the first supplemental appropriation for disaster relief spending on September 2, 2005, just four days after landfall. This appropriation provided \$10.5 billion for initial relief efforts.<sup>66</sup> Everyone understood that this was a drop in the bucket compared to what would be needed, but it was the first step to help the victims. Six days later, Congress appropriated another \$51.8 billion.<sup>67</sup>

Further relief was slowed because of concerns about federal and state preparation and response. Paying for federal recovery assistance certainly had political implications. At a Congressional hearing, Republican Rep. Henry Bonilla of Texas told Mississippi Governor Haley Barbour that "Members of Congress are hearing from constituents saying, 'We're really not interested in you supporting any additional relief until there's some real strong accountability.'"<sup>68</sup> Nonetheless, more funds were appropriated as New Orleans is an important economic engine because of its busy international port at the mouth of the Mississippi River.

In December 2005, 91 days after Katrina made landfall, Congress approved a presidential request to reallocate Department of Defense appropriations for use in Katrina recovery.<sup>69</sup> Although the

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<sup>65</sup> See, e.g., GOV'T ACCOUNTABILITY OFF., CATASTROPHIC DISASTERS ENHANCED LEADERSHIP, CAPABILITIES, AND ACCOUNTABILITY CONTROLS WILL IMPROVE THE EFFECTIVENESS OF THE NATION'S PREPAREDNESS, RESPONSE, AND RECOVERY SYSTEM, GAO-06-618 (2006); GOV'T ACCOUNTABILITY OFF., HURRICANE KATRINA BETTER PLANS AND EXERCISES NEEDED TO GUIDE THE MILITARY'S RESPONSE TO CATASTROPHIC NATURAL DISASTERS, GAO-06-043 (2006); THE FEDERAL RESPONSE TO HURRICANE KATRINA LESSONS LEARNED (2006) (prepared for the White House by the Department of Homeland Security), <https://perma.cc/3JZM-425W>; LYNN E. DAVIS, JILL ROUGH, ET AL., RAND CORP., HURRICANE KATRINA: LESSONS FOR ARMY PLANNING AND OPERATIONS (2007) [https://www.rand.org/content/dam/rand/pubs/monographs/2007/RAND\\_MG603.pdf](https://www.rand.org/content/dam/rand/pubs/monographs/2007/RAND_MG603.pdf).

<sup>66</sup> Emergency Supplemental Appropriations to Meet Immediate Needs Arising From the Consequence of Hurricane Katrina, 2005, Pub. L. No. 109-61, 119 Stat. 1988 (Sept. 2, 2005).

<sup>67</sup> Second Emergency Supplemental Appropriations Act to Meet Immediate Needs Arising from the Consequences of Hurricane Katrina, 2005, Pub. L. No. 109-62, 119 Stat. 1990 (Sept. 8, 2005).

<sup>68</sup> *Governor Faults Congress on Katrina Funds*, ST. LOUIS POST-GAZ. A4 (Dec. 8, 2005).

<sup>69</sup> Pub. L. No. 109-148, 119 Stat. 2680.

total appropriations were substantially less than the estimates of the damage or even the short-term needs, the aid was appropriated at a record pace. A substantial portion of this appropriation was earmarked to provide for the immediate needs of the victims and the cost of evacuation, rescue, and relief services. Ultimately, Congress appropriated approximately \$120 billion in Katrina relief and recovery.<sup>70</sup>

The relief efforts continued to fail. Five years later, in 2009, 31,500 households still considered themselves to be in transition and not permanently settled.<sup>71</sup> This was approximately seven percent of the New Orleans population.<sup>72</sup>

In the fall of 2005, Hurricanes Rita and Wilma made landfall in the Southeastern U.S., causing tens of billions of dollars more damage. Rita and Wilma caused approximately \$18.5 billion and \$19 billion in damage, respectively, making them the tenth and ninth costliest hurricanes on record.<sup>73</sup> They struck an already devastated area, further straining resources, but receiving a much more robust response, even though Rita's landfall on September 24, 2005, was just under a month after Katrina.

The relief failures exhibited in response to Katrina demonstrated that changes were clearly needed. Both the Federal

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<sup>70</sup> FEDERAL DISASTER ASSISTANCE, *supra* note 62. In addition to providing billions of dollars in direct relief, Congress also provided temporary tax relief and benefits to victims, their employers, and their charitable benefactors. Gulf Opportunity Zone Act of 2005 (GO Zone Act), Pub. L. No. 109-135, 119 Stat. 2577, 2596-98 (codified at scattered sections of the Internal Revenue Code of 1986, as amended) (providing limited tax relief benefitting victims of Hurricanes Katrina, Rita, and Wilma and their benefactors); Katrina Emergency Tax Relief Act of 2005 (KETRA), Pub. L. No. 109-73, 119 Stat. 2016, 2027 (Sept. 23, 2005) (codified in scattered sections of the Internal Revenue Code of 1986, as amended) (providing limited tax relief benefitting victims of Hurricane Katrina and their benefactors). To the extent that the tax provisions benefited the victims or were sound policy, there has been much debate. Cords, *Charity Begins at Home? An Exploration of the Systemic Distortions Resulting from Post-Disaster Giving Incentives*, *supra* note 32; Cords, *Charitable Contributions for Disaster Relief: Rationalizing Tax Consequences and Victim Benefits*, *supra* note 32; Tolan, *supra* note 32, at 829-35; Aprill & Schmalbeck, *supra* note 32, at 53-56 (2006).

<sup>71</sup> Kimberly A. Geaghan, *Forced to Move: An Analysis of Hurricane Katrina Movers 2009 American Housing Survey: New Orleans*, SEHSD Working Paper Number 2011-17, U.S. Census Bureau, 6 (2011) <https://www.census.gov/content/dam/Census/library/working-papers/2011/demo/SEHSD-WP2011-17.pdf>.

<sup>72</sup> *Id.* These households had a median income of \$25,000, were primarily minorities, and reported occupying an average of 5 residences during the 5 years since Katrina. *Id.* at 6-7.

<sup>73</sup> *Billion-Dollar Weather and Climate Disasters*, *supra* note 1.

Government<sup>74</sup> and many states<sup>75</sup> have worked to change their emergency management structures. Although the response to subsequent disasters has not been not flawless, during the 2008 storm season, Hurricanes Gustav and Ike both made landfall on the Gulf Coast causing numerous deaths and billions of dollars of damage. Ike and Gustav are the sixth and the nineteenth costliest hurricanes to make landfall in the U.S. having caused \$30 billion and \$6 billion of damage, respectively.<sup>76</sup> The Gulf Coast area was better prepared for landfall; mandatory evacuation orders were issued and heeded.<sup>77</sup> The Federal Government made an emergency appropriation for relief and recovery for Gustav within four weeks of landfall and Ike within just over two weeks of its landfall.<sup>78</sup>

In addition to providing direct appropriations for relief and recovery within weeks of landfall, Congress also provided a variety of temporary tax relief measures for individuals, households, and

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<sup>74</sup> See, e.g., Post-Katrina Emergency Management Reform Act of 2006, 109th Cong., Pub. L. No. 109-295, 120 Stat. 1394 (Oct. 4, 2006) (codified in scattered sections of titles 6 and 42 of the U.S.C.).

<sup>75</sup> Sharona Hoffman, *Preparing for Disaster: Protecting the Most Vulnerable in Emergencies*, 42 U.C. DAVIS L. REV. 1491, 1547 (2009) (citing *Legal and Regulatory Issues* 24 (2006), HEALTH RESOURCES & SERVS. ADMIN., DEP'T OF HEALTH & HUMAN SERVS., EMERGENCY SYSTEM FOR ADVANCE REGISTRATION OF VOLUNTEER HEALTH PROFESSIONALS (ESAR-VHP)).

<sup>76</sup> *Billion-Dollar Weather and Climate Disasters*, *supra* note 1.

<sup>77</sup> See, e.g., Adam Nossiter & Graham Bowler, *Hurricane Gustav Makes Landfall on Louisiana Coast* N.Y. Times, Sept. 1, 2008, <https://www.nytimes.com/2008/09/01/world/americas/01iht-storm.1.15793587.html?searchResultPosition=10> (visited Aug. 8, 2019).

<sup>78</sup> Following Hurricanes Gustav and Ike in 2008, the initial additional appropriations were slightly slower, but much more generous, it was twenty-nine days after Hurricane Gustav made landfall on Sept. 1, 2008, and seventeen days after Hurricane Ike made landfall on September 13, 2008 that the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act of 2009, Pub. L. No. 110-329, 122 Stat. 3574 (2008) was enacted. However, the delay in making a supplemental appropriation following Hurricane Gustav may not be as significant, as it was much smaller than many of those that we are discussing, having caused \$6 billion, making it relatively small in comparison to some of these other hurricanes – which is not to say that it was by any means insignificant or did not require additional resources, just that there may have been adequate resources available in the days that followed landfall and three weeks may not have been unreasonable. In contrast, Hurricane Ike caused \$30 billion in damage, requiring significant immediate resources, therefore a \$40 billion disaster relief appropriation approximately two weeks (17 days) after landfall was a rapid response that provided substantial resources critical to relief and recovery efforts for both hurricanes.

businesses that were affected by Hurricanes Katrina, Rita, Wilma, and Ike.<sup>79</sup> These were relatively generous relief packages.

On August 27, 2011, almost exactly 6 years after Katrina made landfall, Hurricane Irene made landfall on the coast of North Carolina, swept up through New York, and into the Northeast.<sup>80</sup> The federal response bore almost no resemblance to that in the lead up to and following Katrina: there was an early declaration of a disaster, closures, and evacuations. In fact, some claimed there was an overreaction. Chad Sweet, Chief of Staff to former Secretary of Department Homeland Security Michael Chertoff, said: “Who would have thought, here we are, six years later, and instead of debating failures, we’re debating being overprepared?”<sup>81</sup> Causing \$13.5 billion in damages, Irene was one of the ten costliest hurricanes in U.S. history.<sup>82</sup>

There were initial concerns about FEMA funding because FEMA had less than \$800 million left in its budget for the fiscal year, which was not over until September 30, 2011, more than a month later.<sup>83</sup> On August 28, 2011, Congress had passed the Fiscal Year 2012 FEMA Budget; Congress had included \$1 billion more than President Obama had requested.<sup>84</sup> On September 1, 2011, before the floodwaters had fully receded, the Obama administration submitted its Report on Disaster Relief Funding, as required by the Budget Control Act, that Congress had passed in August.<sup>85</sup> The report stated that additional disaster relief funding would be needed. Not only was there Irene recovery to pay for but four other major disasters had also occurred in

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<sup>79</sup> Katrina Emergency Tax Relief Act of 2005, Pub. L. No. 109-73, 119 Stat. 2016 (2006) (Katrina); Gulf Opportunity Zone Act of 2005, Pub. L. No. 109-135, 119 Stat. 2577 (2006) (Katrina, Rita, Wilma); Heartland Disaster Tax Relief Act of 2008, Pub. L. No. 110-343, § 702, 122 Stat. 2765 (2009) (extending the temporary relief available to victims of Katrina, Rita and Wilma to victims of Ike).

<sup>80</sup> Nat’l Weather Svc., Nat’l Oceanic and Atmospheric Admin., Hurricane Irene, August 26-27, 2011, <https://www.weather.gov/mhx/Aug272011EventReview>.

<sup>81</sup> *Six Years After Katrina, Praise for Irene Response*, CNN.com, <https://perma.cc/FGW5-SXT4>.

<sup>82</sup> *Billion-Dollar Weather and Climate Disasters*, *supra* note 1.

<sup>83</sup> Carl Hulse, *Federal Austerity Changes Disaster Relief*, N.Y. TIMES (Aug. 30, 2011) (discussing the conservatives’ resistance to increase deficit spending for disaster relief without decreasing spending somewhere else).

<sup>84</sup> Continuing Appropriations Resolution, 2013, Pub. L. No. 112-175, 126 Stat. 1313.

<sup>85</sup> OFF. MGMT. AND BUDGET, OMB REP. ON DISASTER RELIEF FUNDING TO THE COMM. ON APPROPRIATIONS AND BUDGET OF THE U.S. HOUSE OF REPRESENTATIVES AND SENATE (Sept. 1, 2011), <https://perma.cc/UBR9-EFZZ>.

2011.<sup>86</sup> In December, Congress passed a supplemental disaster relief appropriation for \$6.4 billion.<sup>87</sup>

### III. SANDY RESPONSE

Sandy made landfall on October 29, 2012, near Atlantic City, New Jersey.<sup>88</sup> It was the fourth costliest hurricane in U.S. history, causing \$70 billion in damage. The focus of its damage was in New York, New Jersey, and ten other northeast states.<sup>89</sup> Sandy's potential for death and property destruction was substantially reduced because its intensity had fallen to a Category 1 hurricane at the time of landfall. It still caused massive flooding, immense property damage, and an enormous interruption of national commerce. Sandy caused extended closures of the New York City airports, the subways and trains, the New York Stock Exchange, and damaged or destroyed 650,000 homes and damaged or closed tens of thousands of businesses.<sup>90</sup> Sandy caused intermittent power grid failures for days.<sup>91</sup>

As was the case after Katrina, after Sandy, many raised concerns about how efficiently the Federal Government, and particularly FEMA, responded to victims' needs. FEMA had prepositioned food and medical supplies at strategic points prior to landfall to avoid the on-the-ground problems it experienced during and following Katrina.<sup>92</sup> This made the immediate response more efficient and effective than it had been for Katrina. However, the recovery phase showed much less improvement. It started with appropriations and is still ongoing.

Sandy marked a severe shift in Congressional funding for disaster relief. Ninety-one days elapsed before Congress passed a

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<sup>86</sup> *Id.*

<sup>87</sup> Disaster Relief Appropriations Act of 2012, Pub. L. No. 112-77, 125 Stat. 1277 (2011).

<sup>88</sup> *Hurricane Sandy*, NAT'L WEATHER SVC., NAT'L OCEANIC AND ATMOSPHERIC ADMIN., (Oct. 29, 2012), <https://www.weather.gov/okx/HurricaneSandy>.

<sup>89</sup> *Billion-Dollar Weather and Climate Disasters*, *supra* note 1.

<sup>90</sup> HURRICANE SANDY REBUILDING STRATEGY, HURRICANE SANDY REBUILDING TASK FORCE, DEPT. OF HOUSING AND URB. DEV., 13 (2013) <https://www.hud.gov/sites/documents/HSREBUILDINGSTRATEGY.PDF>.

<sup>91</sup> James M. Van Nostrand, *Keeping the Lights on During Superstorm Sandy: Climate Change Adaptation and the Resiliency Benefits of Distributed Generation*, 23 N.Y.U. ENVIR. L.J. 92, 96 (2015).

<sup>92</sup> Steve Vogel, *Officials and Experts Praising FEMA for Its Response to Hurricane Sandy*, Nov. 1, 2012, WASH. POST; Michael S. Schmidt & Eric Lipton, *A Chance to Show Progress at FEMA*, Oct. 30, 2012, N.Y. TIMES, A23.

\$50.7 billion appropriations bill,<sup>93</sup> far longer than it took for Congress to respond to prior or subsequent storms. As discussed above, following Katrina, the first appropriation of disaster relief funds was made four days after Katrina made landfall,<sup>94</sup> twenty-nine days after Gustav,<sup>95</sup> seventeen days after Ike,<sup>96</sup> and just over two months after Irene, which hit just before the beginning of the new fiscal year.<sup>97</sup>

Six years after Sandy, some survivors remain displaced, and recovery efforts continue. Of the 2013 appropriation, \$42 billion was subject to sequestration as a result of the government shutdown.<sup>98</sup> This funding was subject to sequester in 2013 under the Budget Control Act of 2011, which reduced the total appropriation available to about \$48 billion.<sup>99</sup>

Although there was praise for the immediate storm response following Sandy, the recovery efforts were abysmal.<sup>100</sup> Not only were Congressional appropriations of disaster relief incredibly slow to come, but FEMA was slow to award and make recovery payments. As of August 2014, less than one-quarter of the \$48 billion available funds appropriated for disaster assistance had been paid out, and only \$19 billion had been obligated or awarded.<sup>101</sup> In a survey of victims in the New York, New Jersey, Connecticut area, conducted by a community-based aid organization, 39 percent of all households responded that one year later their homes had not yet been fully repaired, with that rate increasing to 50 percent among all low-income respondent and all

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<sup>93</sup> Disaster Relief Appropriations Act of 2013, Pub. L. No. 113–2, 127 Stat. 4 (Jan. 29, 2013); *see also* Bruce R. Lindsay & Justin Murray, *Supplemental Appropriations for Disaster Assistance: Summary Data and Analysis*, 4, CRS R43665 (Oct. 1, 2014).

<sup>94</sup> *See supra* note 66 and accompanying text.

<sup>95</sup> *See supra* note 78.

<sup>96</sup> *Id.*

<sup>97</sup> *See supra* note 88, and accompanying text.

<sup>98</sup> Off. of Mgmt. and Budget, Final Sequestration Report to the President and Congress for Fiscal Year 2013, 4, [https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/legislative\\_reports/sequestration/sequestration\\_final\\_april2013.pdf](https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/legislative_reports/sequestration/sequestration_final_april2013.pdf).

<sup>99</sup> Pub. L. 112–25, 125 Stat. 40 (Jan. 4, 2011) (requiring sequestration of appropriations in excess of discretionary spending limit). OFF. OF MGMT. AND BUDGET, FINAL SEQUESTRATION REPORT TO THE PRESIDENT AND CONGRESS FOR FISCAL YEAR 2013, 8, [https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/legislative\\_reports/sequestration/sequestration\\_final\\_april2013.pdf](https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/legislative_reports/sequestration/sequestration_final_april2013.pdf).

<sup>100</sup> Steve Vogel, *Officials and Experts Praising FEMA for Its Response to Hurricane Sandy*, WASH. POST, (Nov. 1, 2012); Michael S. Schmidt and Eric Lipton, *A Chance to Show Progress at FEMA*, N.Y. TIMES (Oct. 30, 2012), A23.

<sup>101</sup> A Long Path to Recovery, Nat'l Ctr. for Disaster Recovery (Oct. 29, 2014) (citing the Recovery Accountability and Transparency Board for Hurricane Sandy Funding).



renter respondent households.<sup>102</sup> More than a year later, more than 30,000 residents of New York were still unable to return to their homes, and over half of the people who had requested aid from FEMA had not received it.<sup>103</sup> Five years after Sandy, thousands of homeowners who had been approved for recovery grants were still waiting to receive their grant so that they could complete the repair work and return home.<sup>104</sup> In March 2015, less than one-third of the funds appropriated, \$15 billion, had been paid out.<sup>105</sup> Even today, funds that are obligated have not been paid, and it is difficult to determine how much of the appropriations have been committed.<sup>106</sup>

#### IV. POST-SANDY DISASTER RESPONSE

The 2017 storm season saw three of the five costliest storms in U.S. history make landfall: Hurricanes Harvey, Irma, and Maria. The federal response showed increased politicization, but also more immediacy. As discussed below, the inflection marked by the response to Sandy may reflect a dangerous tipping point that requires immediate action to prevent further disadvantage to future victims.

Hurricane Harvey made landfall on August 25, 2017, in Houston, Texas. It caused estimated damage of \$125 billion.<sup>107</sup> Harvey is now tied for the second-costliest hurricane on record.<sup>108</sup> Houston is home to one of the most important oil export ports, perhaps increasing its perceived importance in the U.S. economy, and creating a strong political incentive to ensure minimal disruption from the

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<sup>102</sup> Research Brief, Hurricane Sandy: Housing Needs One Year Later, Enterprise Community Partners (Oct. 2013) (last visited Feb. 27, 2019), <http://perma.cc/9LKL-QUV3>.

<sup>103</sup> Meeks, *supra* note 56, at 448.

<sup>104</sup> Amy S. Rosenberg and Frank Kummer, *Hurricane Sandy, Five Years Later: People Living In Cars And Other Realities Of A Slow-Moving Recovery*, THE PHILA. INQUIRER, (Oct. 26, 2017), <https://perma.cc/5E8V-XFAD>; Bridget Downes & Anthony Rifulato, *Hurricane Sandy, Five Years On*, LI HERALD (Oct. 26, 2017), <https://perma.cc/VNP9-VC3G>.

<sup>105</sup> *Recovery Accountability and Transparency Board for Hurricane Sandy Funding, Final Report to Congress on Activities Related to Hurricane Sandy Funds*, 2 (May 2015), <http://perma.cc/5W8W-TFJN>.

<sup>106</sup> Appropriations were spread across numerous agencies. Within FEMA the funds were allocated to numerous Presidential Disaster Declarations, and each Presidential Disaster Declaration has its own tracking of expenses and commitments. *See, e.g.*, FEMA, New Jersey Hurricane Sandy (DR-4086), <http://perma.cc/LQ2B-FFXZ>; FEMA, New York Hurricane Sandy (DR-4085), <http://perma.cc/TU3Q-A4GT>; FEMA, West Virginia Hurricane Sandy (DR-4093), <http://perma.cc/HGY2-PUYC>.

<sup>107</sup> *Billion-Dollar Weather and Climate Disasters*, *supra* note 1..

<sup>108</sup> *Id.*

storm as possible.<sup>109</sup> In Houston, more than 200,000 people were displaced.<sup>110</sup>

At the same time, of the 24 Texas counties hit by Harvey, those experiencing property damage were disproportionately minority and lower-income residents.<sup>111</sup> The 24 Texas counties in the Gulf Coast region that experienced the greatest property damage were disproportionately minority and lower-income residents.<sup>112</sup>

Congress quickly appropriated \$15.25 billion for Harvey relief two weeks after landfall.<sup>113</sup>

Hurricane Irma made landfall in the U.S. Virgin Islands on September 6, before arriving in Florida on September 10, 2017. Irma became the fifth costliest hurricane in U.S. history, with estimated damages of \$50 billion.<sup>114</sup> It was followed on September 20th by Hurricane Maria.

Maria made landfall on Puerto Rico on September 20, 2017, as a category 4 hurricane. It is the third costliest hurricane in U.S. history.<sup>115</sup> The damage estimate is \$90 billion.<sup>116</sup> FEMA had diverted many of the prepositioned relief resources for use in Irma, making fewer resources available for victims of Maria in Puerto Rico. In addition, having been hit with so many large hurricanes, in such a short period of time, resources were spread thin. Maria caused at least 2,975 deaths in Puerto Rico<sup>117</sup> and left 35 percent of the island's population

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<sup>109</sup> See, e.g., Akin Oyedele, *Hurricane Harvey Could Be the Costliest Natural Disaster In US History — Here's How We'll Know the True Cost*, BUS. INSIDER (Aug. 30, 2018), <https://www.businessinsider.com/hurricane-harvey-economic-impact-2017-8>.

<sup>110</sup> *The Atlantic Hurricane Season and The Importance of Resilience*, GLOBAL REPORT ON INTERNAL DISPLACEMENT 2018, 42, 43 (2019) <http://perma.cc/D3W4->.

<sup>111</sup> Kaiser Permanente Foundation & Episcopal Health Foundation, *An Early Assessment of Hurricane Harvey's Impact on Vulnerable Texans in the Gulf Coast Region 5-7* (December 2017) (reporting on a representative sample survey) [http://www.houstontx.gov/postharvey/public/documents/12.2017\\_ehf\\_kff\\_harvey\\_survey.pdf](http://www.houstontx.gov/postharvey/public/documents/12.2017_ehf_kff_harvey_survey.pdf).

<sup>112</sup> *Id.*

<sup>113</sup> Continuing Appropriations Act, 2018 and Supplemental Appropriations for Disaster Relief Requirements Act, 2017, Pub. L. No. 115-56, 131 Stat. 1129 (Sept. 8, 2017).

<sup>114</sup> *Billion-Dollar Weather and Climate Disasters*, *supra* note 1.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Ascertainment of the Estimated Excess Mortality from Hurricane Maria*, MILKEN INST. SCHOOL OF PUB. HEALTH AT GEORGE WASH. UNIV., <https://perma.cc/QLJ7-DGUM>, 9 (last visited Aug. 8, 2018) (this study was commissioned by the governor of Puerto Rico and estimate was made using an excess death model. Another longitudinal study concluded that the death toll from Maria could be as high as 4645. Nishant Lishore et al., *Mortality in Puerto Rico After Maria*, 379 NEW ENG. J. MED., Vol. 2, 2018, 162, 167. This study was based on

without power four months after Maria.<sup>118</sup> Although congressional and public outcries for relief and recovery efforts are strong, presidential reluctance to get involved, coupled with repeated presidential threats to withdraw already promised aid put communities at growing risk. The island of Puerto Rico has an incredibly high poverty rate; more than 40 percent of the population lives in poverty, compared to 14 percent of the population on the mainland United States.<sup>119</sup> Although \$91 billion in disaster relief has been appropriated,<sup>120</sup> only a fraction of that has been disbursed.<sup>121</sup>

Victims of Hurricane Maria, the third costliest hurricane on record,<sup>122</sup> have received far less political support than victims of any

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surveys and review of death certificates; researchers noted that they did not have access to all information. *Id.* After being given access to the Puerto Rico Demographic Registry, which they did not have during their initial study, they revised their estimate to 3,433 deaths attributable to Hurricane Maria in the 200 days between September 20, 2017 and April 15, 2018. *Id.*; see also José A. Delgado Robles, *Harvard University Researchers Affirm that There Were 3,433 Excess Deaths*, ENDI ELNUEVODIA.COM (English version) (Sept. 9, 2018), <https://perma.cc/DGTJ-78X9>. As of April 15, 2018, the researchers concluded that the death rate had normalized. *Id.* One of the researchers, Professor Rafael Irizarry, attributes the higher death count in the Harvard study than the George Washington study to the longer time span covered by the Harvard study and Harvard's access to the Demographic Registry. *Id.* Puerto Rico changed its official death count to reflect the number determined in this study within hours of its release. Sheri Fink, *Nearly a Year After Puerto Rico Revises Death Toll to 2975*, N.Y. TIMES, A1 (Sept. 13, 2018). Although Puerto Rico has made the higher number its official death count, President Donald J. Trump denied that the higher numbers was accurate, that they reflect an effort by the democrats "to make me [Trump] look as bad as possible." Philip Rucker, Robert Costa, and Josh Dawsey, *Trump Creates Political Storm with False Claim on Puerto Rico Hurricane Death Toll*, WASH. POST (Sept. 13, 2018)).

<sup>118</sup> Monica Villamizar, *Here's Why Restoring Power to Puerto Rico is Taking So Long*, PBS NEWSHOUR TRANSCRIPT, (Jan. 25, 2018), <https://www.pbs.org/newshour/show/heres-why-restoring-power-in-puerto-rico-is-taking-so-long>. More than 450,000 people out of 1.5 million residents remained without power for four months after Maria made landfall. *Id.* Moreover, even in the city of San Juan, the power grid was subject to blackouts for hours at a time. *Id.*

<sup>119</sup> 2017 *Poverty Rates in the United States*, U.S. CENSUS BUREAU, <https://www.census.gov/content/dam/Census/library/visualizations/2018/comm/poverty-map.pdf> (last visited October 6, 2018) (using data from the 2017 American Community Survey and the 2017 Puerto Rico Community Survey).

<sup>120</sup> Pub. L. No. 115-56 (appropriating \$15.25 billion for disaster relief for Harvey and Irma, \$7.4 billion of which went to the Disaster Relief Fund); Pub. L. No. 115-72 (appropriating \$18.67 billion for disaster relief for all three storms, up to \$4.9 billion of which could be provided to Puerto Rico in the form of a loan, but which has not been), and Pub. L. No. 115-130 (Consolidated Appropriations Act of 2019, Pub. L. No. 116-6 (appropriating up to \$91 billion to Puerto Rico and the U.S. Virgin Islands for disaster relief).

<sup>121</sup> Charley E. Willison et al., *Quantifying Inequities in US Federal Response to Hurricane Disaster in Texas And Florida Compared With Puerto Rico*, BMJ GLOBAL HEALTH (2019), <https://gh.bmj.com/content/bmjgh/4/1/e001191.full.pdf>.

<sup>122</sup> *Billion-Dollar Weather and Climate Disasters*, *supra* note 1.

other disaster. This is more clearly politically motivated than some earlier disaster relief funding decisions. This is demonstrated by tweets from the current president, Donald J. Trump. In a series of illustrative tweets on October 12, he stated that “‘Puerto Rico survived the Hurricanes, now a financial crisis looms largely of their own making.’ says Sharyl Attkisson. A total lack of . . .”<sup>123</sup> “. . . accountability say the Governor. Electric and all infrastructure was disaster before hurricanes. Congress to decide how much to spend. . .”<sup>124</sup> “. . . We cannot keep FEMA, the Military & the First Responders, who have been amazing (under the most difficult circumstances) in P.R. forever!”<sup>125</sup> and from the Presidential twitter account, “Donald Trump says Puerto Rico can’t get aid ‘forever’.”<sup>126</sup> Indeed, rather than finding ways to support and seek to bring the country together and bring aid, he accused the media and victims of being against those trying to help, “. . . want everything to be done for them when it should be a community effort. 10,000 Federal workers now on Island doing a fantastic job”<sup>127</sup> and “Fake News CNN and NBC are going out of their way to disparage our great First Responders as a way to ‘get Trump.’ Not fair to FR or effort!”<sup>128</sup>

However, with respect to Hurricanes Irma and Maria, Congress found supplemental appropriations far less urgent than its appropriations for Harvey. However, it was still more timely than relief for Sandy. The first appropriation was made on October 26, 2017, and was included in the second appropriation for recovery for Hurricane Harvey.<sup>129</sup> This appropriation was made 36 days after Hurricane Maria’s landfall, and 49 days after Irma’s first landfall in the Virgin Islands. Nonetheless, there was a desperate need for the

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<sup>123</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 12, 2017, 5:49 AM) <https://twitter.com/realDonaldTrump/status/918428456869916672>.

<sup>124</sup> *Id.* (Oct. 12, 2017, 5:59 AM).

<sup>125</sup> *Id.* (Oct. 12, 2017, 6:08 AM).

<sup>126</sup> U.S. President News, (@President), TWITTER (Oct. 12, 2017, 8:41 AM) <https://twitter.com/President/status/918501944380891136>; Assoc. Press, *Donald Trump Says Puerto Rico Can’t Get Aid Forever*, DENVER POST (Oct. 12, 2017) (linked from President’s tweet) <http://dpo.st/2zhMVcj>.

<sup>127</sup> Donald J. Trump (@realDonaldTrump) TWITTER (Sept. 30, 2017, 4:29 AM) <https://twitter.com/realDonaldTrump/status/914089888596754434>.

<sup>128</sup> *Id.* (Sept. 30, 2017, 4:48 AM) <https://twitter.com/realDonaldTrump/status/914094625488502784>.

<sup>129</sup> Additional Supplemental Appropriations for Disaster Relief Requirements Act, 2017, Pub. L. 115- 72, 1224 (Oct. 26, 2017).

appropriation as there were already demonstrably inadequate resources available for recovery.

Although the timing of appropriations suggests that the survivors of all of the 2017 hurricanes received excellent treatment, that is not the case. Not only were resources deployed more quickly to the more heavily politically represented and affluent areas of Texas, but the appropriations have been disproportionately weighted and disbursed to those areas as well. Puerto Rico and the U.S. Virgin Islands, territories which have no voting representation in Congress and were devastated by Irma and Maria, received much lower appropriations. Moreover, FEMA and other agencies have been much slower to disburse aid to those areas. Further, the total amount of appropriations relative to damage that has been made for subsequent disasters continues to raise concerns with respect to the treatment of future victims. While not discounting the importance of budgetary constraints, it is a question of priorities.

### **A. Moving Forward**

Recent major storm responses have demonstrated continuing major inadequacies in FEMA planning for management coordination of response efforts. Alleviating massive human suffering should not be a matter of politics. Following Sandy, legislation to improve FEMA was passed.<sup>130</sup> This was after legislation requiring restructuring and improvements following the embarrassingly inadequate response to Katrina.

Piecemeal legislation necessarily results in unequal treatment of the survivors of various disasters. Vulnerable populations are those most adversely impacted by slow appropriations, delayed disbursements, and other inadequate relief and recovery responses. In the face of a disaster, the disabled and poor are the ones who are unable to evacuate. These people are also often renters and minorities. In the long term because they tend to have fewer resources, they are less likely to be able to afford relocation or repairs and replacement of damaged or destroyed property.<sup>131</sup> Victims of some disasters have

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<sup>130</sup> Sandy Recovery Improvement Act of 2013, Pub. L. 113-2, 127 Stat. 4 (Jan. 29, 2013).

<sup>131</sup> These groups often overlap. Low income victims are less likely to receive adequate assistance than higher income victims. *See, e.g.,* Austin Sarat & Javier Lezaun, *Introduction*, 3 in *CATASTROPHE: LAW, POLITICS, AND THE HUMANITARIAN IMPULSE* (Sarat & Lezan Ed. 2009).

fared better than victims of other disasters when it comes time for Congress to act. This disparate benefit is a result of flaws in the design of the disaster relief system and the degree to which it allows the passage of time and politics to creep into the disaster relief and recovery system, rather than designing the system to drive decisions on the basis of need without regard to the place or timing of the disaster.

Sandy survivors were the unfortunate victims of the fourth costliest hurricane to make landfall in the U.S. and the vagaries of our disaster relief system at a time when the political will to act was at an all-time low. As this Article demonstrates, the Congressional response represents a new low point, despite efforts to correct clear errors made during the relief and recovery efforts in the wake of Hurricane Katrina. Although it was clear that systemic improvements were still needed Sandy demonstrated areas in which systemic response to major disasters has actually weakened. Further improvements must be made in the interests of improving societal and distributional justice.

Two major changes are required. First, we must develop substantial plans to mitigate the damage resulting from major disasters and truly coordinate the response when major disasters occur, although that is beyond the scope of this Article. Second, we must develop consistently, certain relief and recovery plans to ensure that survivors and communities are assured that following a major disaster both vulnerable populations and communities will receive adequate aid to rebuild and that no population or community will receive better treatment by virtue of its greater political clout, its more favorable location, or other ex-post considerations.

Nonetheless, it is clearly the trend. Indeed, some of the recent bills to provide additional, supplemental funding for disaster relief have been met with resistance because the Congressional Members from other states do not believe that their constituents will support the aid.<sup>132</sup> However, the because climate change is causing more frequent, more costly disasters politically motivated, locally centered views on disaster relief funding are short-sighted. Such a piecemeal approach to disaster relief and recovery is also demonstrably harmful to many of our citizens, is very inequitable and should be revisited.

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<sup>132</sup> See *supra* note 65 and accompanying text.

## B. Comparison of Responses

Disaster relief is a swinging pendulum. Not all systemic flaws observed in response to Hurricane Katrina were addressed by legislative changes to our disaster relief system, notwithstanding comments made following Gustav that we might have been overprepared. This was demonstrated by the response to Sandy. Once again, the calls for change were immediate and loud. The response was slow, inadequate, and again, a one-off.

The sole means of providing disaster relief for major disasters continue to be supplemental appropriations. Therefore, survivors of Sandy were at the mercy of Congress to pass legislation to provide assistance. Congress did, but it took time.<sup>133</sup> Moreover, the relief was more limited than survivors of other disasters have received. Some disasters have received temporary tax relief,<sup>134</sup> but that was not granted for Sandy.

The federal response to Sandy demonstrated a shift that makes even clearer the need to create a more consistent approach to disaster relief. Sandy relief appropriations were slow to be made, putting survivors at economic risk and creating housing instability because recovery resources were unavailable. The delay resulting from political distaste for funding aid primarily harmed those who were displaced and unable to find assistance elsewhere. However, as an unintended side effect, the New York City/New Jersey metropolitan metro area, which is critical to the nation's security, infrastructure, and the economy, was placed at risk, without access to the billions of dollars needed to repair essential infrastructure. This infrastructure is needed not only locally, but important to national interests. Although the Presidential Disaster Declaration was promptly made and the physical response was improved compared to Katrina, the appropriations were inadequate, and the bureaucratic challenges of

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<sup>133</sup> Disaster Relief Appropriations Act of 2013, Pub. L. No. 113-2, 127 Stat. 4 (Jan. 29, 2013).

<sup>134</sup> Katrina Emergency Tax Relief Act of 2005 (KETRA), Pub. L. No. 109-73, 119 Stat. 2016, 2027 (Sept. 23, 2005) (codified in scattered sections of the Internal Revenue Code of 1986, as amended) (providing limited tax relief benefitting victims of Hurricane Katrina and their benefactors); Disaster Tax Relief and Airport and Airway Extension Act of 2017, 115th Cong., Pub. L. No. 115-63, 131 Stat. 1167 (Sept. 29, 2017) (codified in scattered sections of 26 U.S.C. (the Internal Revenue Code of 1986, as amended); 42 U.S.C., and 49 U.S.C.) (providing limited tax relief for victims of hurricanes Harvey, Irma, and Maria, their benefactors, and the territories of the Virgin Islands and Puerto Rico; as well as providing for extensions of certain unrelated expiring provisions of law).

recovery returned the disaster relief system to a position that was worse than prior to Katrina. This marks an inflection point, putting all victims and society at risk.

## V. FUTURE RESPONSES

Trends in disaster response, relief, and recovery aid indicate that the inequities are growing. Victims should not be placed in the positions of receiving aid solely based on the way political winds happen to be blowing. Although Sandy resulted in substantial federal appropriations to repair and replace damaged infrastructure damage, the money was slow to come and some remains unpaid. Although Sandy's damage was clearly apparent, Congressional appropriations were delayed by unrelated concerns.

The current disaster relief system provides the utmost discretion to FEMA, the President, and Congress. This leaves citizens and states at a significant disadvantage in the face of a major disaster like Sandy, Harvey, or Maria, and it puts the victims of a Maria at an utter disadvantage to a Harvey, due to their relative position and perceptions, notwithstanding their need or merit.

When Sandy blew in and left devastation in twelve states, the survivors and public were to learn soon that not only had the federal response system not been fixed, but in many important ways it was worse. Although there was an adequate physical response, there was little financial support in the short term. The treatment of Sandy survivors and their communities represented a low point in federal disaster appropriations.

The disparate treatment of victims of natural disasters results in enormous hardship to individuals and communities. It also results in substantial inequity. One constant in response to disasters is that vulnerable populations receive substantially worse treatment,<sup>135</sup> which is exacerbated by inconsistent treatment between incidents. The aid available for relief and for recovery should not depend solely on when in time a person becomes a victim, nor should it depend on how functional Congress is either between its houses or in its relationship with the President. The current ad hoc approach to determining how much aid will be provided is, at best, a disservice to our citizens. It is

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<sup>135</sup> See generally, Elizabeth Pierson Hernandez, *Twice Uprooted: How Government Policies Exacerbate Injury to Low-Income Americans Following Natural Disasters*, 14 SCHOLAR 219 (2011).



essential to provide certainty to those who face a potential disaster. As we all stand behind a Rawlsian veil of ignorance,<sup>136</sup> not knowing whether we will be the victim or paying for the recovery effort, it is unwise to leave open the possibility that we will suffer from the short-sightedness of our current system.

## **VI. CONCLUSION**

Both fortunately and unfortunately, it appears that Sandy reflects an inflection point. Unfortunately, it took longer for Congress to appropriate funds to provide for relief than it did following major disasters before and after. Fortunately, it also appears that it marks a change in the time in which the Federal Government will attempt to get a response on the ground, absent significant political considerations, such as a personal belief regarding the degree to which the community and its members deserve relief. The clear disparity of the treatment the communities and survivors experienced following Sandy compared to Katrina, Harvey, and Maria regarding timing and nature of appropriations and types of relief demonstrate this shift in Congressional views on disaster relief that occurred with Sandy.

Permanent solutions are required. Sandy needs to be a point of inflection and reflection on our funding for federal disaster relief.

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<sup>136</sup> See generally JOHN RAWLS, A THEORY OF JUSTICE (1971).